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M. E. Jones
Proc. II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-190270

DATE: February 13, 1978

MATTER OF: Southern Maryland General Contractors, Inc.

DIGEST:

1. Affidavits stating belief that firm bidding both as subcontractor and as member of joint venture, without informing competitors of dual role, improperly attempted to influence bid prices, are not sufficient to overcome affidavits denying such intent. GAO therefore does not object to award to joint venture. If protester has further evidence of collusion or false certification of Independent Price Determination, it should be submitted to procuring agency for possible forwarding to Department of Justice under applicable regulations.
2. GAO declines to consider effect of self-certification as small business by joint venture whose combined receipts may exceed dollar limit contained in solicitation because GAO does not review questions relating to small business size status and procurement was not set aside for small business.

Southern Maryland General Contractors, Inc. (SMGC) has protested award of a contract by the Chesapeake Division, Naval Facilities Engineering Command, under invitation for bids (IFB) No. N62477-74-B-0333. The solicitation covered the second increment in construction of a facility for disposal of aged and unstable solid missile propellant at the Naval Ordnance Station, Indian Head, Maryland.

Award has been made to Mech-Con Corporation and Heller Electric Company, Inc. (Mech-Con/Heller), a joint venture bidding \$4,258,643. SMGC, the second-low bidder at \$4,338,000, protested to our Office

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before award on two grounds. First, SMGC believed, the joint venture had misrepresented itself as a small business because the combined annual receipts of the two firms for the preceding fiscal years exceeded the \$5 million limit contained in the standard form (SF) 19-B definition of a small business.

Second, SMGC alleged, Heller had improperly attempted to influence prices of its competitors by bidding both as a member of the joint venture and as an electrical subcontractor, without disclosing this fact to other bidders. Immediately before bid opening, Heller quoted prices to SMGC and other general contractors which were "substantially higher" than the actual competitive price for the electrical work in question. SMGC contended this could only have been for the purpose of attempting to cause those contractors, who lacked time to recalculate costs for electrical work included in their bids, to submit total bids higher than that of the joint venture. Accordingly, SMGC concluded that Heller's bidding constituted a "communication * * * for the purpose of restricting competition," and violated the certification of Independent Price Determination contained in SF 19-B.

The Navy, considering whether to make award while the protest was pending, disregarded SMGC's first objection because the procurement had not been set aside for small business. As for the second, the presidents of Mech-Con and Heller each submitted affidavits to the Navy stating that they had entered into the joint venture at the suggestion of their mutual surety in order to increase Mech-Con's bonding capacity, not with the intent that Heller should treat Mech-Con more favorably than other bidders to whom it quoted prices. Heller's president further affirmed that the firm had quoted the same price (\$585,000) for electrical work to Mech-Con and to two other general contractors with whom it had previously done business, but had quoted higher prices (\$670,000 and \$605,000) to SMGC and another general contractor with whom it was less familiar, due to added contingency factors.

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The Navy determined that Heller had not violated its certification of Independent Price Determination and found that delays in resolving SMGC's protest would have a substantial adverse effect upon both the project and the environment (completion of the proposed facility would permit disposal of 6.5 tons daily of waste propellant then being open-burned). It therefore awarded the contract to the Mech-Con/Heller joint venture on September 30, 1977.

During a conference at our Office, the parties agreed that it is common practice in the construction industry for subcontractors to submit last-minute quotes and for general contractors to arrive at their final prices immediately before bid opening. SMGC acknowledged that Heller's quote for electrical work (which SMGC states was \$690,000) had no effect upon its total bid price; SMGC does its own electrical work and, using its own \$400,000 estimate, had already telephoned a final bid to its on-site representative when the Heller quote was received. Two other general contractors have stated that they did not change their bids in response to the last-minute quotes from Heller.

Thus, since neither the Government nor other bidders have been prejudiced, the issue for our consideration is whether Heller's conduct constituted an attempt to restrict competition or otherwise violated the certification of Independent Price Determination. The certification is prescribed by Armed Services Procurement Regulation (ASPR) § 7-2002.1 (1976 ed.), and stated in pertinent part:

"(a) By submission of this bid, each bidder certifies, and in the case of a joint bid each party thereto certifies as to his own organization, that in connection with this procurement:

"(1) The prices in this bid have been arrived at independently, without consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;

"(2) Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening, in the case of a bid, or prior to award, in the case of a proposal, directly or indirectly to any other bidder or to any competitor; and

"(3) No attempt has been made or will be made by the bidder to induce any other person or firm to submit or not to submit a bid for the purpose of restricting competition."

In 51 Comp. Gen. 403 (1972), our Office held that a suspicion that a subcontractor's quote for mechanical work was intentionally high, so that the subcontractor could incorporate a realistic lower bid for the same work into its price as a prime contractor, constituted a legitimate business reason for submission of multiple bids by affiliated firms. Although counsel for the protester cites that decision in support of the proposition that one firm bidding both as a subcontractor and as a "secret" general contractor restricts competition, we have interpreted the case merely as recognizing that the practice exists and may be countered. Grimaldi Plumbing and Heating Co., Inc., B-183642, May 20, 1975, 75-1 CPD 307.

In support of its argument that Heller's conduct was illegal, counsel for the protester also cites Premier Electrical Construction Co. v. Miller-Davis Co., 422 F. 2d 1132 (7th Cir. 1970). In that case, the court found a per se violation of the Sherman Anti-Trust Act in an agreement between a general contractor and an electrical subcontractor in which the general contractor promised that, if successful, it would award the electrical work to the subcontractor in return for that firm's submitting inflated bids to the general contractor's competitors. The case is distinguishable in that the electrical subcontractor, as plaintiff in a concurrent suit, admitted

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its part in the conspiracy and argued that the general contractor's subsequent failure to award it the electrical work constituted a breach of contract. In the instant case, Mech-Con and Heller have denied any intent to conspire, and there is no actual evidence of collusion.

In still another case in which collusion was alleged, two prospective contractors bid apparently high prices on single groups of items and, at the same time, bid on all groups as a joint venture. We stated:

" * * * We are not aware of any rule of law which would prohibit submission of separate bids by a joint venture and members thereof individually, nor can we conclude that such action is necessarily evidence of collusion, especially where, as here, full disclosure of their relationship and their agreement is made and there is no evidence that the arrangement tended to stifle competition. See Hyer v. Richmond Traction Company, 168 U.S. 471 (1897).

* * * * *

"We recognize that submission of the high bids by each of the joint venturers on groups IV and V did result in making the aggregate price of any combination of bids for the five items higher than the bid of the joint venturers on the five items. However, we cannot conclude from the record that this was deliberately and knowingly done to accomplish this purpose. ***** Therefore, we cannot say that the apparently high prices submitted by the individual members of the joint venture on groups IV and V were unreasonable or evidenced any collusion between them." B-146182, June 30, 1961.

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While the instant case involves a subcontractor as joint venturer, we believe the same rationale applies. In this regard we note that the president of SMGC and another of the general contractors to whom Heller quoted prices as an electrical subcontractor submitted affidavits to our Office expressing the belief that Heller attempted to influence their bid prices. The presidents of Mech-Con and Heller submitted affidavits denying any such intent. We do not believe that the affidavits submitted by SMGC and the other general contractor provide a sufficient basis to conclude that the award to the joint venture was improper. If the protester has additional evidence of collusion or false certification of Independent Price Determination, it should be submitted to the Navy for possible forwarding to the Department of Justice under ASPR § 5 1-111 and 1-115(f) (1976 ed.) See G&B Chemicals, Incorporated, B-179966, February 15, 1974, 74-1 CPD 76.

With regard to the size status of the Mech-Con/Heller joint venture, we note that our Office does not review questions of a bidder's small business size status. Walco-Power Service, Inc., B-190128, September 29, 1977, 77-2 CPD 246. In any event, the procurement in question was not set aside for small business.

Accordingly, the protest is denied.

R. F. K. H.
Deputy Comptroller General
of the United States